

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4030-99
PLDarcy

date: FEB 15 2000

to: District Director, Manhattan
Examination Division
Attn: Mr. Lawrence Paduano

from: District Counsel, Manhattan

subject: [REDACTED]

Tax Years Ended November [REDACTED], November [REDACTED], November [REDACTED],
November [REDACTED], November [REDACTED] and [REDACTED]

Determination of the Tax Matters Partner

Uniform Issue List # 6231.07-00

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This memorandum responds to your request for additional advice on determining who is the tax matters partners ("TMP") of [REDACTED] ("[REDACTED]"), a New York partnership subject to the uniform partnership audit procedures, I.R.C. § 6221 et. seq. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This advice is subject to National Office review. We will contact you within two weeks of the date of this memorandum to discuss the National Office's comments, if any, about this advice.

ISSUE:

1. Who is the tax matters partner of [REDACTED] for the taxable years ended November [REDACTED], November [REDACTED], November [REDACTED], November [REDACTED] and [REDACTED] [REDACTED]?

CONCLUSION:

We conclude that [REDACTED] is currently the TMP of [REDACTED] for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED]. For the taxable years ended November [REDACTED], November [REDACTED] and [REDACTED], we conclude that [REDACTED] currently has no TMP and the Internal Revenue Service will have to designate a TMP for these periods.

FACTS:

THE ADVICE IS RENDERED ON THE BASIS THAT ALL THE REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, WE MAY NEED TO MODIFY OUR ADVICE.

A. INTRODUCTION

The Examination Division is currently auditing the taxable years ended November [REDACTED] through [REDACTED] of [REDACTED], a New York partnership subject to the uniform partnership audit procedures. I.R.C. § 6221 et. seq. The parties seek to extend the statute of limitations on assessment for these periods. You have requested our advise to assist you in identifying the TMP of [REDACTED] of the purposes of obtaining an extension of the statute of limitations on assessment. In memoranda dated July 20, 1999 and August 5, 1999, we advised you that for the taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED], [REDACTED] is the TMP and the only person authorized to extend the statute of limitations on assessment of items on behalf of [REDACTED].

In a memorandum dated [REDACTED], [REDACTED]'s counsel, [REDACTED], expressed disagreement with the conclusions set forth in our memoranda of July 20, 1999 and August 5, 1999. [REDACTED]'s memorandum urges the Internal Revenue Service to accept [REDACTED]'s [REDACTED] "designation" of the [REDACTED] as the TMP for the taxable years ended November [REDACTED], [REDACTED], November [REDACTED], [REDACTED], November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED]. [REDACTED] further argues that the current TMP

of [REDACTED] is [REDACTED], the successor by merger of [REDACTED]. See [REDACTED]'s memorandum, pp. 10-12. We disagree with the [REDACTED]'s conclusions. To assist you in responding to [REDACTED], we have attached the body of a proposed letter that you can provide to [REDACTED] explaining the position of the Internal Revenue Service in this matter.

B. The Tax Matters Partner of [REDACTED]

On its Federal partnership income tax returns ("Forms 1065") for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED], [REDACTED] designated [REDACTED], in her personal capacity, as the TMP. On its Forms 1065 for the taxable years ended November [REDACTED], November [REDACTED] and [REDACTED], [REDACTED] designated [REDACTED] as the TMP.

Prior to [REDACTED], [REDACTED] had several general partners. During [REDACTED], [REDACTED] became [REDACTED]'s sole general partner. At this time, [REDACTED] and the other general partners became limited partners of [REDACTED]. According to [REDACTED], its partnership agreement provides that its "Management Committee should designate a partner who shall be [TMP] within the meaning of Section 6231 of the Internal Revenue Code of 1986." See [REDACTED]'s Memorandum, pp 1-2. During [REDACTED], the Management Committee was renamed the Executive Committee. The Executive Committee was comprised of former general partners of [REDACTED] and current officers of [REDACTED].

On [REDACTED], the Executive Committee of the [REDACTED] passed the following resolution ostensibly designating a new TMP:

The Executive Committee designates [REDACTED] as the TMP with respect to the Internal Revenue Service examination of the United States Partnership Income Tax Returns of [REDACTED] for the fiscal years ended November [REDACTED], [REDACTED], November [REDACTED], [REDACTED], November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED]. [REDACTED] in her capacity of Executive Vice President will act on behalf of [REDACTED].

(hereinafter we refer to this document as the "Executive Committee Resolution"). [REDACTED] executed the [REDACTED] Executive Committee Resolution on behalf of the Executive Committee. At the time, [REDACTED] was [REDACTED]'s Executive Vice Chairman and the member of the Executive Committee who generally

dealt with tax matters. Shortly thereafter, in [REDACTED], [REDACTED] submitted the Executive Committee Resolution to the Examination Division. [REDACTED] never filed the Executive Committee Resolution with any Internal Revenue Service service center.

On [REDACTED], [REDACTED] merged into [REDACTED] in a statutory merger pursuant to I.R.C. § 368(a)(1)(A) and no longer exists as an entity. On or about [REDACTED], the [REDACTED] submitted a proposed Form 872-P to extend the statute of limitations on assessment of items attributable to its taxable years ended November [REDACTED], [REDACTED] and November [REDACTED], [REDACTED] until [REDACTED], [REDACTED]. This proposed Form 872-P listed as the TMP "[REDACTED], Successor in Interest to [REDACTED] by [REDACTED]." In our memoranda of August 5, 1999, we advised you not to rely on this Form 872-P. [REDACTED] was never a partner of the [REDACTED].

DISCUSSION:

I. THE TMP OF [REDACTED]

Pursuant to I.R.C. § 6229(b)(1)(B) the Internal Revenue Service can extend the statute of limitations with respect to the assessment of partnership items by entering into an agreement with the TMP (or any other person authorized by the partnership in writing to enter into such an agreement) before the expiration of such period. [REDACTED] does not argue that it authorized someone other than the TMP to extend the statute of limitations on assessment for the taxable years at issue. Therefore, the only issue is who is the TMP of [REDACTED].

1. [REDACTED] Did Not Properly Designate [REDACTED]
[REDACTED] as TMP For The Taxable Years Ended November
[REDACTED], November [REDACTED] and November [REDACTED]

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(a) a partnership may designate a partner as its TMP or revoke a current TMP's status only as provided for in Treasury Regulation § 301.6231(a)(7)-1. (Emphasis added). On its Forms 1065 for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED], [REDACTED] properly designated [REDACTED] as its TMP. Treas. Reg. § 301.6231(a)(7)-1(c). [REDACTED]'s designation as TMP for these taxable years remains in effect until such time as she properly resigns as TMP pursuant to Treasury Regulation §

301.6231(a)(7)-1(i); [REDACTED] makes a valid designation of a new TMP pursuant to Treasury Regulations §§ 301.6231(a)(7)-1(d), (e) or (f); or [REDACTED] revokes [REDACTED]'s TMP designation pursuant to Treasury Regulation § 301.6231(a)(7)-1(j).¹ Treas. Reg. §§ 301.6231(a)(7)-1(L)(1)(v)(A-C).

[REDACTED] argues that on [REDACTED] it properly designated [REDACTED] as its new TMP and, therefore, its successor, [REDACTED], is the current TMP. We conclude the [REDACTED] is still the TMP of [REDACTED] for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED] because [REDACTED]'s [REDACTED] attempt to designate a new TMP did not comply with the provisions of Treasury Regulation § 301.6231(a)(7)-1. Although [REDACTED] argues that it complied with the provisions of Treasury Regulations §§ 301.6231(a)(7)-1(d), (e) or (f), we disagree.

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(e), a partnership may designate a TMP for a specific taxable year at any time after the filing of its Form 1065 for that taxable year by filing a statement with the service center with which the Form 1065 was filed. According to the Treasury Regulations, this statement shall:

- (1) Identify the partnership and the designated partner by name, address, and taxpayer identification number;
- (2) Specify the partnership taxable year to which the designation relates;

¹ Treasury Regulation § 301.6231(a)(7)-1(j) permits the Partnership to revoke [REDACTED]'s TMP designation by filing a statement of revocation with the service center. The content requirements of such a revocation essentially mirror those of Treasury Regulation § 301.6231(a)(7)-1(e) dealing with designating a TMP. Since the Partnership has not filed any document purporting to revoke [REDACTED]'s TMP status, we will not provide a detailed discussion on the revocation issue. However, we do conclude that the Executive Committee Resolution submitted by the Partnership does not constitute a revocation of [REDACTED]'s TMP status pursuant to Treasury Regulation § 301.6231(a)(7)-1(j). Additionally, [REDACTED] never executed any document that the Internal Revenue Service could reasonably consider a resignation under Treasury Regulation § 301.6231(a)(7)-1(i).

- (3) Declare that it is a designation of a TMP for the taxable years specified; and
- (4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year.

The Executive Committee Resolution purporting to designate [REDACTED] as the new TMP clearly does not comply with Treasury Regulation § 301.6231(a)(7)-1(e) and, therefore, is not effective. [REDACTED] never filed the designation with the service center where it filed its Forms 1065. Furthermore, the designation does not identify [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6231(a)(7)-1(e)(1).

Most important, the designation is executed only by [REDACTED] Thain, as a representative of [REDACTED]'s Executive Committee, and not by "persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50 percent of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year" as required by Treasury Regulation § 301.6231(a)(7)-1(e)(4). [REDACTED] appears to assume that [REDACTED]'s signature can substitute for the Treasury Regulation's requirement that any designation be signed by the general partners holding more than 50 percent of the aggregate interest in [REDACTED]'s profits. We found nothing in New York law concerning the authority of a partnership committee such as the Executive Committee in this case. However, the issue in this case is strictly a Federal tax law issue governed by the Internal Revenue Code and accompanying Treasury Regulations. Accordingly, we do not believe that the [REDACTED] properly designated the [REDACTED] as TMP.

[REDACTED] further argues that [REDACTED], as TMP, properly "designated" a new TMP by tendering the Executive Committee Resolution to the District Director. Treasury Regulation §301.6231(a)(7)-1(d) permits a current TMP to certify that a new TMP has been properly selected. Treasury Regulation §301.6231(a)(7)-1(d) does not permit a TMP to actually designate a new TMP. Pursuant to Treasury Regulation §301.6231(a)(7)-1(d), the current tax matters partner shall make the certification by

filing with the service center with which the partnership return is filed a statement that--

(1) Identifies the partnership, the partner filing the statement, and the successor tax matters partner by name, address, and taxpayer identification number;

(2) Specifies the partnership taxable year to which the designation relates;

(3) Declares that the partner filing the statement has been properly designated as the tax matters partner of the partnership for the partnership taxable year and that that designation is in effect immediately before the filing of the statement;

(4) Certifies that the other named partner has been selected as the tax matters partner of the partnership for that taxable year in accordance with the partnership's procedure for making that selection; and

(5) Is signed by the partner filing the statement.

The Executive Committee Resolution purporting to certify [REDACTED] as the new TMP clearly does not comply with Treasury Regulation § 301.6231(a)(7)-1(d) and, therefore, is not effective. First, it does not provide [REDACTED]'s address and taxpayer identification number as required by Treasury Regulation § 301.6231(a)(7)-1(d)(1). Second, it does not specifically certify that [REDACTED] has been selected as the TMP in accordance with the [REDACTED]'s procedure for making that selection as required by Treasury Regulation § 301.6231(a)(7)-1(d)(1)(4). Finally, it was not signed by [REDACTED], the partner filing the statement, as required by Treasury Regulation § 301.6231(a)(7)-1(d)(1)(5).

Treasury Regulation § 301.6231(a)(7)-1(f)(1) provides an alternative method for designating a TMP if, at the time the designation was made, each partner is no longer a "partner" of the the partnership. Treas. Reg. § 301.6231(a)(7)-1(f)(1)(iv). At the time [REDACTED] tendered the Executive Committee Resolution, [REDACTED], [REDACTED] was still the general partner of [REDACTED]. Accordingly, the alternative designation method set forth in Treasury Regulation § 301.6231(a)(7)-1(f)(2) does not apply.

Even if [REDACTED] could rely on the alternative designation method set forth in Treasury Regulation § 301.6231(a)(7)-1(f), the Executive Committee Resolution does not comply with the requirements set forth in Treasury Regulation § 301.6231(a)(7)-1(f)(2). Specifically, the Executive Committee Resolution was never filed with any Internal Revenue Service service center as required by the flush language of Treasury Regulation § 301.6231(a)(7)-1(f)(2). Additionally, the Executive Committee Resolution does not "identify the partnership and the designated tax matters partner by name, address, and taxpayer identification number" as required by Treasury Regulation § 301.6231(a)(7)-1(f)(2)(i).

[REDACTED] did not make a valid designation of [REDACTED] as TMP for the taxable years ended November [REDACTED], November [REDACTED] and November [REDACTED] pursuant to Treasury Regulations §§ 301.6231(a)(7)-1(d), (e) or (f) or revoke [REDACTED]'s TMP designation pursuant to Treasury Regulation § 301.6231(a)(7)-1(j). Therefore, [REDACTED] remains the TMP of [REDACTED] for these periods.

2. The Merger of [REDACTED] Terminated [REDACTED]'s Status as TMP

On its Forms 1065 for the taxable years ended November [REDACTED], November [REDACTED] and [REDACTED], [REDACTED] properly designated The [REDACTED] as its TMP. Treas. Reg. § 301.6231(a)(7)-1(c). [REDACTED] argues that [REDACTED] is the current TMP of [REDACTED] as successor in interest to [REDACTED]. Pursuant to Treasury Regulation § 301.6231(a)(7)-1(l)(iii), [REDACTED]'s status as TMP of [REDACTED] ended on [REDACTED] when it merged into [REDACTED]. [REDACTED] relies on the holding of Cable Television of Connecticut v. Commissioner, T.C. Memo. 1993-106, to support its conclusion that the [REDACTED] merger did not terminate [REDACTED]'s status as TMP. Cable Television of Connecticut involved the question of whether a corporation's I.R.C. § 338 election terminated its status as TMP. I.R.C. § 338 applies to cases where one corporation transfers its assets to a new corporation; there is no third party entity involved in the transfer. A statutory merger pursuant to I.R.C. § 368(a)(1)(A) involves a third party assuming control of the corporation that acted as TMP. It is the position of the Internal Revenue Service that a third party entity that was not active in the partnership's

business can not act as TMP. Accordingly, the Internal Revenue Service uniformly considers a statutory merger a "dissolution or liquidation" that terminates the merged corporation's status as TMP. Thus, in our view, the [REDACTED] statutory merger, whereby [REDACTED] merged into [REDACTED], terminated the TMP status of [REDACTED].

3. [REDACTED] Can Not Act As [REDACTED]'s
TMP For Any Period

Pursuant to Treasury Regulation § 301.6231(a)(7)-1(b)(1) a Partnership may designate a person as TMP for a taxable year only if that person--

- (i) was a general partner in the partnership at some time during the taxable year for which the designation is made; or
- (ii) is a general partner in the partnership as of the time the designation is made.

Since [REDACTED] was never a partner of [REDACTED], [REDACTED] can not designate it to act as TPM. Therefore, we conclude that [REDACTED] has no TMP for the taxable years ended November [REDACTED] November [REDACTED] and [REDACTED].

I.R.C. § 6231(a)(7) defines a TMP as follows:

- (A) the general partner designated as the tax matters partner as provided in regulations, or
- (B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the TMP. (Emphasis added).

Obviously, in this case where no general partner exists both I.R.C. § 6231(a)(7)(A) and (B) become impracticable to apply and

the Internal Revenue Service must rely, if possible, on the flush language of I.R.C. § 6231(a)(7) to designate a TMP. A "partner" is defined, inter alia, as "a partner in the partnership" and "any other person whose income tax liability under subtitle A is determined in whole or part by taking into account directly or indirectly partnership items of the partnership." I.R.C. § 6231(a)(2). Accordingly, I.R.C. § 6231(a)(7) allows the Internal Revenue Service to designate a limited partner to act as TMP; however, I.R.C. § 6231(a)(7) clearly prohibits [REDACTED] from designating someone who is not a general partner as TMP.

Treasury Regulation § 301.6231(a)(7)-1(q) states:

- (1) In general. The Commissioner will select a partner as the tax matters partner under paragraph (p)(2) or (3)(ii) of this section only if the partner was a partner in the partnership at the close of the taxable year under examination.
- (2) Criteria to be considered. The Commissioner may consider the following criteria in selecting a partner as the tax matters partner:
 - (i) The general knowledge of the partner in tax matters and the administrative operation of the partnership.
 - (ii) The partner's access to the books and records of the partnership.
 - (iii) The profits interest held by the partner.
 - (iv) The views of the partners having a majority interest in the partnership regarding the selection.
 - (v) Whether the partner is a partner of the partnership at the time the tax-matters-partner selection is made.
 - (vi) Whether the partner is a United States person (within the meaning of section 7701(a)(30)).

Pursuant to I.R.C. § 6231(a), [REDACTED] and the other limited partners of [REDACTED] were all partners of the [REDACTED]. Accordingly, the Internal Revenue Service can designate one of [REDACTED]'s limited partners to act as TMP by carefully considering the relevant criteria set forth in Treasury Regulation § 301.6231(a)(7)-1(q)(2) for designating a TMP. We request that

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you allow us to review any proposed designation you may wish make prior to making that designation.

We again remind you that this advice, including the proposed letter to the taxpayer attached hereto, is subject to review by the National Office. As discussed on page one, we will contact you within two weeks of the date of this memorandum to discuss any comments the National Office may have regarding this advice. Should you have any questions regarding this matter, please contact Paul Darcy at (212) 264-5473 extension 256.

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